TWENTY ARROWS

Selected 2020 Decisions of the Supreme Court of Mississippi,
Court of Appeals of the State of Mississippi,
and the October 2019 Term of the United States Supreme Court

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Including research by Alexandra LeBron and India Sprinkle

Presented to the OSPD & MPDA
Fall Public Defenders Conference
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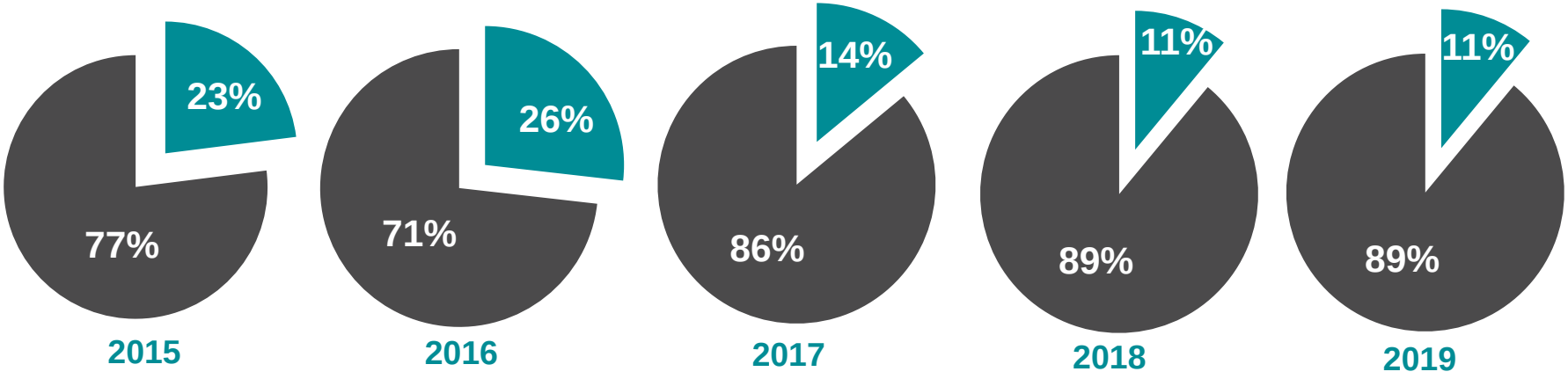
Historical Overview of Criminal Dispositions of the Mississippi Supreme Court

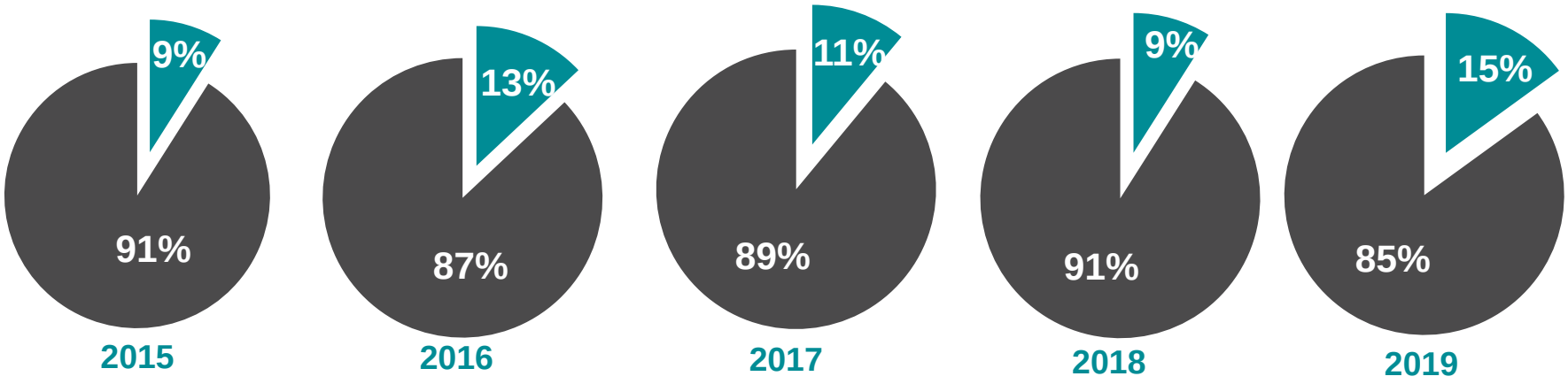
- In 2015, the Supreme Court decided 53 criminal cases on the merits, reversing 12 and vacating 2, for a roughly 23% reversal rate
- In 2016, the Court lowered the number of criminal cases it retained. In that year, it reviewed 35 criminal cases, reversing 9 (with 1 remanded)
- In 2017, 43 criminal cases were reviewed, with 6 reversed
- In 2018, 37 criminal cases were reviewed, with 4 reversed
- In 2019, 35 criminal cases were reviewed, with 4 reversed, for a 11% reversal rate



Source: *Annual Report of the Supreme Court* for 2015, 2016, 2017, 2018, and 2019

Historical Overview of Criminal Dispositions of the Court of Appeals

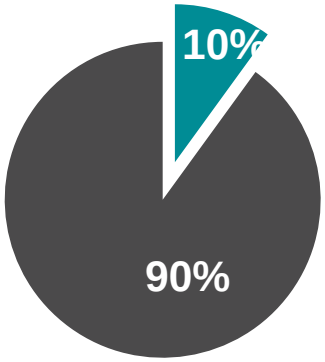
- In 2015, the Court of Appeals resolved 127 criminal cases on the merits, reversing 12, for a 9% reversal rate
- In 2016, 121 criminal cases were reviewed, with 18 reversed
- In 2017, 132 criminal cases were reviewed, with 14 reversed
- In 2018, 136 criminal cases were reviewed, with 12 reversed
- In 2019, 120 criminal cases were reviewed, with 18 reversed



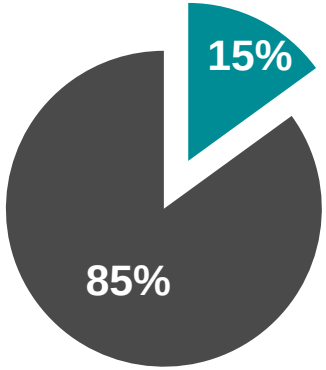
Source: *Annual Report of the Supreme Court* for 2015, 2016, 2017, 2018, and 2019

2020 So Far

- With two more months in the year, the Supreme Court has issued opinions in 29 criminal cases, reversing 3
- Of the 109 criminal cases considered by the Court of Appeals so far in 2020, 16 have been reversed
- Very similar number of cases disposed of and rates of reversal for both courts to their performance in 2019



2020 Supreme Court

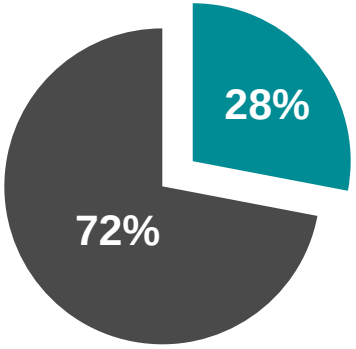


2000 Court of Appeals

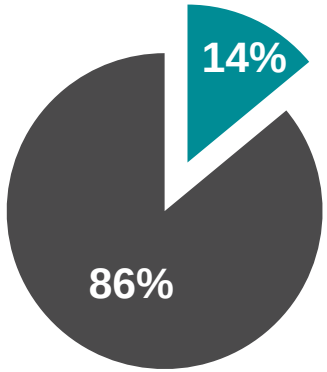
Source: Internal Statistics

An Even Broader Historical Perspective

- At the turn of the century in 2000, the Supreme Court reviewed 60 criminal cases on the merits—71% more than in 2019
- In 2000, the Court of Appeals disposed of 249 criminal cases—108% more than in 2019
- 214 were affirmed and 35 reversed



2000 Supreme Court



2000 Court of Appeals

Source: Supreme Court of Mississippi, *2000 Annual Report, Executive Summary*

What types of arguments have worked well in 2020 so far?

Smoots v. State, 2020 WL 3248939 (Miss. Ct. App. June 16, 2020)

No summary can do better than the Court itself, through Presiding Judge Wilson:

"When officers entered the pool hall, they found Smoots and two other men sitting at a table. The officers heard a toilet running and found about ten rocks of crack cocaine wrapped in toilet paper in the sewer cleanout outside.

The State's evidence probably was sufficient for a rational juror to infer that *one of the three men* in the pool hall flushed the cocaine down the toilet just before the officers entered. But that is all it could prove. The evidence was not sufficient to prove beyond a reasonable doubt that *Smoots*—and not one of the other two men—was guilty of possessing and flushing the drugs."

Smoots v. State

- "There is no evidence that Smoots, as opposed to Demario or Hodges, possessed and flushed the cocaine found outside the pool hall. The evidence permitted only an inference that one of the three men was guilty, and the jury could only guess as to the guilty party. A criminal conviction cannot rest on such "substantial guesswork, speculation and conjecture."

- Judge Greenlee would have affirmed "after viewing the evidence in the light most favorable to the prosecution," joined by Presiding Judge Carlton and Judge Lawrence.

Smoots v. State

- George Holmes for the Indigent Appeals Division of the Office of the State Public Defender on behalf of the defendant

ARGUMENT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT FOR SMOOTS' TWO CONVICTIONS OR WHETHER THE VERDICTS WERE CONTRARY TO THE WEIGHT OF EVIDENCE?

Sufficiency of the Evidence - Possession

There was no proof that Smoots had knowledge of, and dominion or control over, the cocaine before it was found in the sewer line. Nothing connected Smoots to the cocaine found in the sewer line other than his occupancy of the space leased for the pool hall. Three men were in the pool hall at the time the warrant was executed. At least one

Pruitt v. State, 289 So. 3d 1227 (Miss. Ct. App. 2020)

Police arrested the defendant for stealing tools from a building in Aberdeen. There was even video footage of a person carrying out items in a crate. The total estimated value by the owner was over $3,000.

The defendant "denied that he broke into the warehouse or took any of [the victim's] property. He acknowledged that he sometimes sold or pawned things for money. Pruitt lived about a quarter of a mile from the warehouse. However, officers never searched his home for the missing items, and none of Wise's missing property was ever recovered."

The jury could have found the defendant was the man in the photos from the footage who was carrying the crate. However, "there was no evidence from which a rational juror could have determined beyond a reasonable doubt which, if any, items Pruitt stole other than the router. Moreover, the router was valued at only $100, well below the $1,000 threshold for grand larceny."

As a result, the Court reversed and rendered the conviction to the lesser crime of petit larceny. Presiding Judge Wilson authored the unanimous opinion.

Pruitt v. State

- Justin T. Cook for the Indigent Appeals Division of the Office of the State Public Defender on behalf of the defendant

SUMMARY OF THE ARGUMENT

The State presented insufficient evidence to convict Pruitt of grand larceny. Over the course of several weeks, objects were alleged to have been stolen from a warehouse. The owner set up a trail camera and caught an image of a person alleged to be Jose Pruitt carrying away a plastic milk crate with some objects in it. With no evidence, the State then alleged that Pruitt had taken *all* of the items from that warehouse over the course of several weeks. Law enforcement never searched Pruitt's home to see if any of the allegedly stolen goods were there, nor did they present any evidence that Pruitt had either pawned or sold any of the goods alleged to have been stolen. Pruitt's conviction rests on the assumption that because Pruitt might have been in the warehouse when he was purported to have been captured by the trail camera, he must have been in the warehouse weeks earlier *and* must have taken the goods alleged to have been taken then. Because such an assumption cannot be the basis of his conviction for grand larceny, the State presented insufficient evidence to support his conviction on that charge. Pruitt's conviction for grand larceny should be reversed and rendered.

Dean v. State, 295 So. 3d 575 (Miss. Ct. App. 2020)

The defendant was convicted of burglary of a home in Laurel. The home was under renovation, and a security camera caught footage of a person rummaging around. On appeal, he argued there was no proof of a breaking.

"During questioning, the State did not elicit any testimony regarding the breaking element. Despite Stubbs's testimony that he had visited the house the day before the incident, Stubbs did not testify as to whether he checked to ensure the windows and doors to the house were locked or even shut. Further, the video introduced by the State does not show the alleged burglar entering or exiting through a closed door or window, and the State did not offer any photographs of the home's windows or doors to show proof of breaking. We thus find that based on the evidence, the State did not prove the element of 'breaking' beyond a reasonable doubt."

Because the State did not request the lesser instruction of trespass, the conviction was reversed and rendered. The opinion was authored by then-Judge Cory Wilson for a (mostly) unanimous Court, with Presiding Judge Carlton concurring in result only.

Dean v. State

- Hunter Aikens for the Indigent Appeals Division of the Office of the State Public Defender on behalf of the defendant

renovations, and the condition of the house led police to believe that it was abandoned when they arrived. The State introduced no evidence of the condition of the house or its doors and windows prior to the incident. The State did not even present any evidence of a suspected point of entry. And the State offered no instruction of the definition of "breaking." Breaking is an essential element of the crime of burglary. The State failed to present sufficient evidence to establish that a breaking occurred. Accordingly, Dean requests this Honorable Court to reverse his conviction and sentence and render a judgment of acquittal in his favor.

Brown v. State, 2020 WL 5904855 (Miss. Ct. App. Oct. 6, 2020)

A security guard at a club put a customer into a headlock in the midst of throwing him out. The customer died, with the medical examiner finding that the cause of death was determined to be complications of hypertensive cardiovascular disease associated with a physical altercation.

The security guard was arrested and convicted of culpable-negligence manslaughter.

On appeal, the Court held that the combination of the victim's pre-existing health conditions related to his obesity, the lack of severe trauma or injuries (there were only minor lacerations and petechia which may have occurred during resuscitation attempts), and the lack of an extensive struggle between the men was insufficient to demonstrate culpable negligence. It just simply wasn't a case where there was an indication of gross negligence.

The conviction was reversed and rendered, with McCarty writing for the Court. Presiding Judge Carlton dissented without separate opinion.

Brown v. State, cont.

- Dan Hinchcliff for the Indigent Appeals Division of the Office of the State Public Defender on behalf of the defendant

stress event. The cause of death was ascribed to "cardiac arrhythmia." (T. 145). Quiney died of a heart attack. Whether Brown contributed to it is speculative at best. It cannot be said that Terrance Brown, acting in his capacity as a security guard, was the proximate cause of death. It is necessary that the proof establish that "whether death of the deceased was **proximately caused"** by Brown's actions, Quiney's stressful actions, or simply occurred due to Quiney's diseased heart. *Herron v. State,* 38 So. 2d 720, 720 (Miss. 1949). Certainly, nothing produced at trial provided adequate proof. The medical examiner made clear, it was complications from hypertensive cardiovascular disease that caused Quiney's death. That it may have been assisted by a "stress event" does not alter the actual reason Quiney died.

Juvenile Life without Parole after *Miller*

- In 2012, the U.S. Supreme Court banned mandatory life imprisonment for people under the age of 18 at the time of their crimes.

- After an extensive review of precedent, the Court reached the "conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller v. Alabama*, 567 U.S. 460, 470 (2012)

- Afterwards, Mississippi appellate courts grappled with how exactly to apply *Miller*, and what findings would be required of a trial court upon remand.

Brett Jones v. State, 285 So.3d 626 (Miss. Ct. App. 2017)

- In a split decision, the majority determined that a circuit judge had properly followed Miller even when the factors were not discussed.

- "The circuit judge in this case held the hearing required by *Miller*. The judge did not specifically discuss on the record each and every factor mentioned in the *Miller* opinion. However, the judge expressly stated that he had "considered each of the *Miller* factors."

  Neither the United States Supreme Court nor the Mississippi Supreme Court has held that reversal is required just because the sentencing judge omits some factors from his on-the-record discussion of the reasons for the sentence. The judge's bench ruling was sufficient to explain the reasons for the sentence. The judge recognized the correct legal standard ("the *Miller* factors"), his decision was not arbitrary, and his findings of fact are supported by substantial evidence. Therefore, the judgment of the circuit court is affirmed.

Jones v. State, in partial dissent

- Judge Westbrooks concurred in part and dissented in part, joined by Chief Judge Lee. The separate opinion focused on the lack of specificity by the trial court.

- "I find the trial court failed to make a finding on the record as to whether Jones is among the *rarest* of juvenile offenders under *Miller* and *Montgomery*. Therefore, I would find that before a juvenile homicide offender may be sentenced to life in prison without the possibility of parole, a sentencing authority must make specific on-the-record findings of fact that illustrate that he is among the very rarest of juvenile offenders who are irreparably corrupt, irretrievably broken, and incapable of rehabilitation."

- The Mississippi Supreme Court granted certiorari.

The Separate Written Statement

- After certiorari was granted in *Jones*, the Supreme Court dismissed it, by a vote of 5-4
- The order was signed by then Presiding Justice Randolph, joined by Justices Coleman, Maxwell, Beam, and Chamberlin
- Presiding Justice Kitchens objected to the order of dismissal, joined by then Chief Justice Waller and Justices King and Ishee
- "Because the record does not reflect Jones's permanent incorrigibility, the circuit court's ruling was an abuse of discretion. Therefore, I would vacate his sentence and remand for resentencing to life imprisonment with eligibility for parole."
- "In light of the fact that a sentence of life without parole is disproportionate under the Eighth Amendment for a juvenile whose crime reflects transient immaturity, Mississippi should exercise its authority to impose a formal fact finding requirement for *Miller* decisions."
- The separate statement is replete with the robust facts, procedural history, overview of the law, and analysis of a full opinion

In the Meantime

- The Court of Appeals carves out a narrow doctrine that certain juvenile offenders are entitled to a jury trial at a *Miller* resentencing—if they were originally subject to a capital murder conviction

- In 2020, the Supreme Court rejects this approach. "Simply put, while McGilberry was entitled to a *Miller* hearing, he was not entitled to a *Miller* hearing in front of a jury." *McGilberry v. State*, 292 So. 3d 199, 205 (Miss. 2020).

- "While *Miller* requires an individualized sentencing hearing, there is no constitutional or statutory right to a jury for that hearing. Therefore, the trial court did not err by denying McGilberry's motion to be resentenced by a jury." *Id*. at 208.

In the Meantime, *Some More*

- In the wake of numerous *Miller* appeals, the Mississippi Supreme Court gradually resolves various procedural and substantive challenges

- This results in the general approach that "consistently reject[s] the argument that *Miller* and its progeny require a determination of 'permanent incorrigibility' or 'irretrievable depravity' before sentencing a juvenile to life without parole." *Ealy v. State*, 2019 WL 5704145, at *5 (Miss. Ct. App. Nov. 5, 2019)

- "Our supreme court has found that *Miller* does not require an explicit finding on a juvenile's incorrigibility," nor does it require a jury to perform the sentencing. *Id*. at *6.

The *Ealy* Special Concurrence

- Judge Anthony Lawrence wrote separately in *Ealy* to articulate the continuing issues with the application of *Miller*.

- "[N]either the judge's on-the-record comments nor the court's order included a determination that Ealy was irreparably corrupt or permanently incorrigible. I write separately to express my concerns about our current precedent holding that a circuit court does not have to articulate that finding on-the-record before sentencing a juvenile to life without parole."

- "Requiring an on-the-record finding by the circuit court that affirms that a juvenile is permanently incorrigible is not too much to ask when those sentences are supposed to be reserved for 'the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" (citing *Montgomery*)

The *Ealy* Special cont.

- "The safer practice, and not too burdensome requirement, would be to mandate that trial courts clearly state what they are constitutionally required to find before sentencing a juvenile to life without parole—is this juvenile one of those rare offenders whose crimes have demonstrated that he or she is irreparably corrupt or permanently incorrigible?

  Because the United States Supreme Court has required one of those two standards be proven before a life without parole sentence can be legally imposed, it would seem prudent and of sound practice to require it to be found on the record either by a ruling from the bench or in a written order. Then, there would be no more guessing as to whether the circuit court indeed found that which is constitutionally required."

- The separate opinion was joined by Judges Westbrooks (who had written separately in *Brett Jones*), Tindell, McDonald, and McCarty

Joshua Miller v. State, 2020 WL 2892820 (Miss. Ct. App. June 2, 2020)

- In one of the most recent *Miller* cases at the Court of Appeals, the Court grappled with a defendant who had been 14 when he shot and killed a 13 year old girl that he had been "dating." He left a note saying "If she can't be mine, she can't be anybody."

- Will Bardwell of the SPLC presented oral argument in the case and vehemently contested the precedent

- Nonetheless, in accord with precedent, the majority held "Miller was afforded a full and fair evidentiary hearing. He was represented by two skilled attorneys, and he had expert testimony from a clinical and forensic psychologist and a former deputy commissioner of the MDOC. Furthermore, the judge made detailed findings of fact addressing the *Miller* factors in support of his decision."

- The case was narrowly affirmed—Presiding Judge Wilson writing to affirm, with Chief Judge Barnes and Judges Greenlee, McCarty, and Cory Wilson concurring.

Joshua Miller v. State, cont.

- Judge Lawrence again specially concurred, expanding on his view articulated in *Ealy*.

- "The findings of fact a circuit court is constitutionally required to make before sentencing a juvenile to life without parole should be free of doubt or guessing. I would find that the circuit court should have made an on-the-record finding that Miller was one of the rare juvenile offenders whose crime reflected permanent incorrigibility before sentencing him to life without parole."

- Presiding Judge Carlton authored a vigorous dissent, believing that the trial judge did not consider the evidence that Miller (recall—only 14 years old) was beyond rehabilitation. "[T]he trial judge's order reflects that he failed to consider the evidence of Miller's untreated ADHD at the time of the offense relative to the impulsiveness of his actions when analyzing Miller's potential for rehabilitation." The presiding judge's dissent was joined by Judges Westbrooks and McDonald.

Back to *Brett Jones*

- The U.S. Supreme Court granted the petition for certiorari on March 9, 2020. *Many* amici have filed briefs in support of both sides, and the acting Solicitor General will present ten minutes of argument in support of the position of the State of Mississippi.
- The case will be argued on November 3rd, 2020. Counsel for Jones have presented one single question on appeal:

QUESTION PRESENTED

Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

- After the cert grant, the Court of Appeals has routinely stayed the time to file motions for rehearing in *Miller* cases, and further stayed briefing in at least one case. Presiding Judge Carlton and Judge Greenlee have are shown as not agreeing with those orders.

The *Jones* Guess

- Betting on the U.S. Supreme Court, like betting on college football, is a sucker's game.
- (If it were easy we'd all be millionaires, and the road to Vicksburg would be paved with gold)
- The dissent by Judge Westbrooks in the Court of Appeals decision in Jones, further articulated by Presiding Justice Kitchens in the separate written statement to the dismissal of cert, plus Judge Lawrence's special concurrences in *Ealy* and *Miller*, highlight a clear path for the Supreme Court—if you're going to require a finding, make the finding
- The State has been backed into a corner on the issue of permanent incorrigibility, arguing that trial courts are complying without having to show the math
- [INSERT WILD GUESS]

Edwards v. State, 294 So. 3d 671 (Miss. Ct. App. 2020)

- The Legislature criminalized "post[ing] a message for the purpose of causing injury to any person through the use of any medium of communication, including the Internet or a computer, ... without the victim's consent."

- Edwards had a "Facebook Live" show about local politics and other matters of interest in the Jackson area. On his show, he accused a local pastor of sexual misconduct. He was convicted under the law.

- Consistent with the statute, the jury was instructed that a message posted "for the purpose of causing injury" violated the statute whether it was "truthful or untruthful."

- Presiding Judge Wilson authored a unanimous opinion for the Court of Appeals finding that the statute was facially overbroad and unconstitutional, relying on an extensive body of precedent from the U.S. Supreme Court. The conviction was reversed and rendered.

Edwards v. State, cont.

- Erin Briggs on behalf of Indigent Appeals Division of the OSPD

> " The United States Supreme Court has held and 'frequently reaffirmed that speech on political views and public issues occupies the 'highest rung of the hierarchy of First Amendment values, and is entitled to special protection. Where the government seeks to restrain political/public issue speech, it must withstand 'strict scrutiny,' which requires the government to demonstrate that the restrain "is (1) narrowly tailored to serve (2) a compelling state interest. A prior restrain is narrowly tailored where 'it does not unnecessarily circumscrib[e] protected expression'." *Mississippi Com'n on Judicial Performance v. Wilkerson,* 876 So. 2d 1006, 1011 (¶20) (Miss. 2004) (internal citations omitted).
>
> Section 97-45-17 does not recognize this distinction. As it is written, if a person posts a message for the purpose of injuring a politician's influence in the community, this statute could criminalize that person's First Amendment right to political speech. If a citizen disagrees with the President of the United States and wants to post messages to dissuade voters from supporting the President, that speech should be protected. Even if the intent is purely to harm the President's reputation and influence in the community. The statute does not allow for this type of permissible

Farewell, Pre-arming Instructions!

- In January of this year, the Supreme Court handed down *Taylor v. State*, 287 So. 3d 202 (Miss. 2020) which abolished the use of pre-arming jury instructions.

- "[T]he purpose of a pre-arming instruction is to inform the fact-finder that one cannot arm himself in advance when he is not in any physical danger, go forth and provoke a confrontation or difficulty with another, shoot the other, and then attempt to hide behind a smoke screen of self-defense." *Taylor v. State*, 287 So. 3d 202, 204 (Miss. 2020).

Taylor v. State, 287 So. 3d 202 (Miss. 2020)

- This was a murder in case in which the defendant claimed self-defense and the trial judge gave a "pre-arming instruction" at the request of the State. Specifically, the judge instructed that it was "for the jury to decide" whether it found, based on "the evidence in [the] case beyond a reasonable doubt," that the defendant "armed himself with a deadly weapon and sought [the victim], with the formed felonious intention of invoking a difficulty with [the victim], or brought on, or voluntarily entered into any difficulty with [the victim] with the design and felonious intent to cause serious bodily harm to [the victim]."

- The jury was instructed that, if it so found, then the defendant "cannot invoke the law of self-defense."

- The COA affirmed the conviction, holding that the instruction was not peremptory in nature, was supported by the evidence, and correctly stated the law.

Taylor v. State, 287 So. 3d 202 (Miss. 2020) Cont.

- Taylor sought certiorari review from the Supreme Court. The Court emphasized that pre-arming instructions were only to be used in "those extremely rare incidents where the instruction was supported by the evidence" and that this was not such a case.

- The Court ultimately held that "one should not necessarily risk estoppel or forfeiture of his privilege of self-defense because he has previously armed himself in anticipation of an attack or a perceived dangerous situation." The Court completely abolished the use of pre-arming instructions.

Newell v. State, 292 So. 3d 239 (Miss. 2020).

- Presiding Justice King wrote the majority opinion for the Supreme Court in reversing Newell's murder conviction. The Court held that it was reversible error for the trial court to give a pre-arming jury instruction as the Supreme Court had abolished such instructions in *Taylor v. State*, 287 So. 3d 202 (Miss. 2020).

- Further, even under previous caselaw, the instruction was still improper. The Supreme Court found that the no evidence exists that Newell had armed himself with the intent to provoke an altercation. Rather, the altercation evolved out of a chance encounter between Newell and the victim as Newell had no knowledge that the victim would even be at the location when he arrived.

Barton v. State, 2020 WL 5834535 (Miss. Oct. 1, 2020)

- Barton was convicted of possession of a stolen firearm under Mississippi Code Section 97-37-35(1), which states, "[i]t is unlawful for any person **knowingly** or intentionally to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm or attempt to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm."

- The gun in question was found under Barton's car seat. The defendant was also a convicted felon, and his argument was that he had hidden the gun not because it was stolen, but because he didn't want to catch trouble for being a felon in possession

- A plurality of the Court of Appeals held that Barton knew he had possession of a stolen weapon and affirmed the conviction.

- In a vigorous dissent, Judge Greenlee pointed out that "[a]ccording to the majority, Barton *knew* the firearm was stolen because his possession of the firearm was unexplained, the firearm was stolen, and he attempted to conceal the firearm. This argument relies on an inference." In his view, both this inference and the use of a burglary-centered test meant the conviction needed to be reversed. Four other judges joined this dissent, push-affirming the trial court.

Barton, cont.

- The Supreme Court granted cert, and unanimously reversed and rendered the conviction.

- “[T]he State's evidence in this case is insufficient to show guilty knowledge. Like in [prior cases], the State presented no direct evidence. It wholly relies upon circumstantial evidence to establish the essential fact that Barton knew or should have known that the firearm was stolen property.”

- “Our courts have long held that for circumstantial evidence to be sufficient evidence, such evidence must exclude every reasonable hypothesis consistent with the defendant's innocence.”

- The Court also warned the State and the COA off of using the inference from the burglary test for these types of cases

Barton, cont.

- Mollie McMillin from the IAD of the OPSD birddogged this one to the end

- From her (3 page!) cert petition:

> There is no evidence of when the gun was stolen, or how long after it was stolen that Barton came to be in possession of it. The owner of the gun, who reported it stolen, did not seem to know how long it was missing before he reported it stolen, and there is no testimony about when he even made the report of the stolen gun. The gun could have been stolen years before it was discovered under Barton's car seat. Boyd testified that the gun "walked out of my house some way or the other . . . I wen to look for it one day and it was gone. And then I reported it stolen." (Tr. 107). There was no evidence of Barton possessing any other stolen goods or any other goods missing from Boyd's home.
>
> Barton's concealment of the gun under the seat of the truck can be attributed to his status as a convicted felon, not guilty knowledge that the gun itself was stolen.

Falcon v. State, 2020 WL 5089519 (Miss. Ct. App. Aug. 20, 2020)

- Authentication of Facebook messages. In the presence of law enforcement, an informant sent the defendant Facebook messages asking to buy a “ball” of meth. The informant testified that when he arrived at Falcon’s house less than twenty minutes later, Falcon promptly sold him an eight-ball of meth without further discussion and showed him the new speakers they had discussed in their Facebook messages.

- The trial judge held that the informant’s testimony about Falcon’s actions upon his arrival at Falcon’s house was sufficient to authenticate the messages as having been sent by Falcon. The Court of Appeals, in an opinion authored by Presiding Judge Wilson, affirmed and held that the ruling was not an abuse of discretion.

Judge Westbrooks, concurring in result only

- Judge Westbrooks concurred in result only. In a separate opinion joined by Judge McDonald, Judge Westbrooks stated the Facebook messages were not properly authenticated and that the trial court erred by allowing the State to enter them into evidence.

Eddie Lee Howard v. State, 300 So. 3d 1011 (Miss. 2020)

- Justice Ishee wrote the opinion for the Supreme Court which reversed Eddie Lee Howard's death sentence and conviction for the murder and rape of an eighty-four-year old woman.

- Howard was tied to crime by Dr. Michael West who testified at trial that bitemarks found on the victim's body were "indeed and without doubt inflicted by . . . Howard."

- After a direct appeal and multiple PCR petitions, the Supreme Court granted Howard's request for DNA testing. Of all the evidence tested, only a bloody knife showed any male DNA---which did not belong to Howard.

- Then, later in 2016, the American Board of Forensic Odontology revised the guidelines Dr. West used in making the identification and prohibited positively identifying a person based on bitemarks. Dr. West was also subsequently ousted from the board.

Howard, Cont.

- Howard filed a PCR petition with the trial court based on this newly discovered evidence. The trial court denied the PCR petition, holding that even though the DNA testing was new evidence, it did not point to an alternative perpetrator. And, Howard had not "present[ed] any new evidence regarding Dr. West or his bite-mark identification that would constitute 'newly discovered evidence [that would] probably produce a different result or induce a different verdict, if a new trial [wa]s granted ....' ".

- The Supreme Court disagreed. In reversing Howard's conviction, the Court held that the presence of another male's DNA could lead a juror to reasonably conclude that there was another perpetrator. Further, the finding that no DNA linked Howard to the crime after the testing was performed was new and material.

- The Court also ruled that the bite mark was "the most important evidence at Howard's trial" and the ABFO's modified guidelines was newly discoverable evidence not available at Howard's 2000 trial.

Presiding Justice Kitchens, specially concurring.

- Presiding Justice Kitchens wrote a special concurrence joined by Presiding Justice King, and the author of the majority, Justice Ishee, joined it in part. The separate opinion basically said “we need to call this—no need to retry it.”

- Among the points Justice Kitchens emphasized were:

- The trial court erred by holding Howard to an evidentiary standard of beyond a reasonable doubt instead of preponderance of the evidence. By dismissing the petition because Howard was unable to point to an alternative perpetrator, the court essentially held that Howard could only satisfy this burden by doing the job of the police and finding the real killer and prove his innocence.

- The Supreme Court "should not uphold a conviction and death sentence on the testimony of a proven unreliable witness, Dr. West."

Justice Griffis, dissenting.

- In a dissenting opinion, Justice Griffis stated he agreed with the trial court that the DNA test results would probably not produce a different result at trial as the fact that there was no DNA evidence tying Howard to crime was not new.

- He also stated that challenges to Dr. West's credibility was not new as he was extensively cross-examined during the trial.

Turner v. State, 291 So. 3d 376 (Miss. Ct. App. 2020)

- Opinion by Judge Lawrence. A woman was driving down a highway when her car stalled out. As she was standing outside of her car to investigate the cause, she was fatally struck by a car. The driver of that car--later identified as Turner--fled the scene of the accident. Turner was conviction of fleeing the scene of an accident resulting in death.

- Part of his sentence ordered him to pay $6,500 in restitution to the woman's family. However, there was no evidence in the record supporting how the trial court arrived at that amount. The issue was not presented at the sentencing hearing, nor was the amount supported by any documents or testimony in the record. Further, there was no indication that Turner was informed of the amount of restitution or provided an opportunity to object.

- The Court of Appeals reversed and remanded the restitution award, holding that it was error to order restitution without any evidence to support the award or to make such an award without providing Turner to opportunity to object.

Presiding Judge Carlton, concurring in part and dissenting in part.

- At the sentencing hearing the State asked the trial court if it could “report back as to the restitution, if there's any.” The court agreed and reserved its ruling on the matter.

- Presiding Judge Carlton concurred that, because the State did not set forth a specific amount at the time of sentencing, Turner could not have objected to the amount at that time. However, because Turner failed to object to the imposition of restitution at the sentencing hearing, he waived that issue on appeal.

Ulmer v. State, 292 So. 3d 611, (Miss. Ct. App. 2020)

- A defendant plead guilty after relying on his trial counsel's assurance that he would receive trusty earned time for doing so.

- In an opinion authored by Judge Lawrence, the Court of Appeals found that this reliance on trial counsel's erroneous advice meant that the plea was not made knowingly, intelligently and voluntarily. The denial of Ulmer's post-conviction relief was reversed and his guilty plea was vacated and remanded.

- Judge Greenlee would have affirmed because a review of the plea hearing transcript showed that the trial court advised Ulmer of his rights, the nature of the charges against him, and the consequences of his plea.

Williams v. State, 291 So. 3d 418 (Miss. Ct. App. 2020)

- Judge Tindell wrote the majority opinion for the Court of Appeals reversing and remanding a conviction for two counts of simple assault against a law-enforcement officer. The Court held that the cumulative effect of the prosecutor's misconduct required reversal.

- During voir dire the potential jurors were asked whether they knew one of the defense's expert witnesses. One juror, who was later empaneled, said she knew the expert through her work as a paralegal. On cross-examination the prosecutor asked the expert, "[D]uring our voir dire section, the question was raised regarding you. And it was stated ... that you have a history in the profession that if you have a doctor that you want to say whatever it is that you want him to say, then you'll call Dr. Webb. Is that kind of true regarding your reputation in the community?" It was later determined during a recess that such a statement was never made. The court instructed the jury to disregard the question.

Williams v. State, 291 So. 3d 418 (Miss. Ct. App. 2020) Cont.

- Also on cross, the prosecutor asked the expert about information not in evidence that she had obtained through during a Google search.
- The prosecutor commented on the late date at which the expert witness was hired.
- Multiple times during her closing arguments, the prosecutor stated that something was wrong with the justice system if a defendant such as Williams could be allowed to assert an insanity defense.

Terry v. State, 2020 WL 772949 (Miss. Ct. App. 2020)

- Chief Judge Barnes issued the plurality opinion. A CI tipped authorities to a residence in which illegal drug activity was allegedly taking place. Armed with a warrant, police visited the house and found that a car was running outside and the front door was ajar. When police announced themselves and went inside, the defendant was found inside with his two children. Drugs were also found in the house in plain view. When asked, the defendant allegedly told the police that he lived in the house for a year.

- The defendant was arrested for constructive possession. On appeal, the defendant argued that the State failed to establish a prima facie case because he didn't live at the house. He claimed he thought the police were asking how long the children, not him, had lived at the residence. According to him, his girlfriend leased the place. He also insisted that he was only at the house to pick up his children and take them to school, which is why a car was running outside.

- A plurality of the Court of Appeals found his argument unpersuasive. The Court pointed out the fact that the defendant was the only person at the residence at the time of the arrest and that the CI had also seen him at the house the day before.

- Additionally, the contraband was in plain view around him when police arrested him. Finally, the Court found that whether the defendant was referring to himself or his children when answering the question about length of time at the residence was a question for the jury. His conviction was affirmed.

- Judge McDonald dissented, opining that the State failed to show the defendant owned the premises. Specifically, the State offered no evidence that the defendant was referring to himself when he answered the question about the residence. Additionally, no other incriminating circumstances existed to tie him to the contraband, such as suspicious behavior on his part.
- Four other judges joined her, “push affirming” the trial court.
- The Supreme Court has granted cert

now it's time for

THE VIEW OF THE HON. ANTHONY N. LAWRENCE, III

- Do your job in defending your client! You are the shield for the defendant. **Be that shield**.
- This means OBJECTING, OBJECTING, OBJECTING. Preservation of error at trial and beyond is CRITICAL for appellate review.
- Ask for experts to be appointed. Too often the State will have an expert, and there is no counter from the defense.
- Fully and deeply cross the State's witnesses to develop your theory of the case.

THE VIEW OF ERIN BRIGGS, ESQ. AND MOLLIE MCMILLIN, ESQ.

- Always file a motion for a new trial—and BE SPECIFIC!
- Get a ruling on the motions you do file at the trial court. Failing to do so can waive the argument.
- HAVE A PLAN TO GET YOUR EVIDENCE IN!!
- Get things marked as ID and refer to the number if there's a problem.
- **MAKE A PROFFER.**
- Don't withdraw jury instructions—make the judge rule on them. **SUBMIT YOUR OWN INSTRUCTIONS**.
- PRESERVE ERROR EVEN IF YOU DON'T BELIEVE IT IS

THE VIEW OF ERIN BRIGGS, ESQ. AND MOLLIE MCMILLIN, ESQ.

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- Get a ruling on the motions you do file at the trial court. Failing to do so can waive the argument.
- HAVE A PLAN TO GET YOUR EVIDENCE IN!!
- [Sidebar from DNM: JHD used to teach our students to have three separate rules + paths to get in evidence—and likewise have three different objections to evidence you know is the crux of the case. Somebody might have a way to battle through one or two of those . . . but not three.
- Get things marked as ID and refer to the number if there's a problem.
- **MAKE A PROFFER.**
- Don't withdraw jury instructions—make the judge rule on them.
- **SUBMIT YOUR OWN INSTRUCTIONS**.
- PRESERVE ERROR EVEN IF YOU DON'T BELIEVE IT IS BECAUSE THE LAWYERS AND COURTS WILL NOT BE ABLE TO USE IT IF YOU DON'T

So what has the U.S. Supreme Court been doing?

- No huge criminal cases (in terms of changing precedent) in the October 2019 term

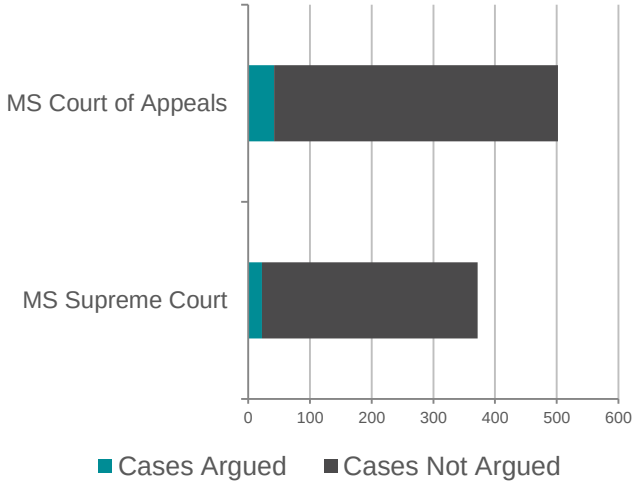
- *Ramos v. Louisiana* required unanimous jury verdicts in criminal cases
- "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." –Justice Gorsuch, for the majority
- *Andrus v. Texas* admonished the Texas Court of Criminal Appeals to conduct a full Strickland analysis as to prejudice when ineffective assistance is shown
- *Kansas v. Glover* allowed an investigative stop after a police officer ran a license plate and found out the registered driver's license was revoked
- *Kahler v. Kansas* allowed a state legislature can modify the insanity defense (here, to only apply to the mens rea element)

WHY FIGHT SO HARD?

- Every single day, every single case, and possibly *one* decision you make in trial or on appeal can be the difference between victory for your client or conviction and affirmance. It might also change the course of law for decades to come.
- The law and view of law changes due to your advocacy and effort. Constitutional rights may be inherent in the people, but they must be claimed by their advocates.
- Due process "is understood not as a promise made by a king but as a right possessed by the people. Due process is a bulwark against injustice, but it wasn't put in place in 1215; **it is a wall built stone by stone, defended, and attacked, year after year**. Much of the rest of Magna Carta, weathered by time and for centuries forgotten, has long since crumbled, an abandoned castle, a romantic ruin." --Jill Lepore

Before we leave. Remember the volume of cases we review are on the briefs.

- You need to make sure you have fully explored your case in your written brief.
- In 2019, the Supreme Court heard oral argument in only 22 of almost 350 cases.
- The Court of Appeals heard oral argument in only 42 of about 460 cases.



Source: Supreme Court of Mississippi, 2019 Annual Report at 25-26 ("2019 Annual Report"), available at https://courts.ms.gov/research/reports/SCTAnnRep2019.pdf

Keep your arguments sharp and simple. A knife doesn't need three blades to cut.

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MEN WALK ON MOON

ASTRONAUTS LAND ON PLAIN; COLLECT ROCKS, PLANT FLAG

Voice From Moon: 'Eagle Has Landed'

A Powdery Surface Is Closely Explored

By JOHN NOBLE WILFORD

Source: https://www.nytco.com/press/july-21-1969-men-walk-on-moon/#:~:text=July%2021%2C%201969%3A%20Men%20Walk%20On%20Moon%20On,Neil%20Armstrong%20and%20this%20renowned%20moment%20in%20history

Questions?

Thank You!

Judge David Neil McCarty
jmccarty@courts.ms.gov